

9 WHAT WE TALK ABOUT WHEN WE TALK ABOUT FAIR USE: CONVERSATIONS ON WRITING PEDAGOGY, NEW MEDIA, AND COPYRIGHT LAW

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I have not even completed the opening sentence of this chapter and I may have already committed an act of theft. T.S. Eliot (1920) said that “mature poets steal” (p. 5); Roland Barthes (1977) suggested that all writers—mature or immature—cannot help but steal, because every text is inevitably unoriginal, a “tissue of quotations” (p. 146) drawn from the ready-made dictionary of a culture’s common language. By fashioning the title of this chapter after the title of a famous short story by Raymond Carver, I may have taken something that, perhaps, was not my property, or I may have simply and innocently harnessed the technique available to me, according to Barthes, “to mix writings” (p. 146). In either case, I have done what all writers ultimately do: appropriate and transform material. Theoretically, because we rely on a shared system of language with (at any particular moment in history) a finite number of words, we would be unable to write or talk without “stealing” words from one another, whether off of the page or out of one another’s mouths. In less accusatory language, I might say we “share” words in order to communicate. But there is sharing and then there is *sharing*—borrowing a number of words necessarily versus borrowing exact syntaxes for entire pages. Luckily, my little act of appropriation does not make me guilty of any crime, as far as I know, except perhaps the writerly crime of making a rather dull change to a perfectly good title. In my defense, although the subject of fair use might not be as grandiose or romantic as love, it appears to be at least as complicated, especially at this particular moment in history when copyright law—an idea designed largely to protect entire books

from being pirated in the print culture of early 18th-century England—is being applied to bits of language, sounds, and pixels from contemporary electronic texts and the multimedia, hypertextual cultures of the Internet.

In Carver's short story, four characters sit around a table drinking gin. As they drink, they struggle to define love—what it is, how it affects their thinking and their lives—often in relation to what love is not, according to conventional thought: namely, abuse. Mel and Terry argue over whether and how it might be possible to discern if seemingly abusive behavior contains evidence of something called love, and as the characters talk and drink, it becomes clear that Carver's story will not offer a resolution to the debate, nor will it concern itself with any particular outcome to any particular plot or sequence of events. The story is simply about a conversation taking place. In a sense, then, it is purely academic.

This chapter is about an academic conversation taking place, albeit a quite different one. Usually, we are far too sober when we gather around a table or linger in our department's hallways, talking about intellectual property in composition studies and trying to understand just what separates, or should separate, fair use from infringement and, further, how the distinction between these terms affects us and the writers we teach. The subject of our conversation may not be as ephemeral or exalted a subject as love; nevertheless, the substance of our talk is vital to our daily practices. It is usually motivated by a genuine love for freedom of speech and an accompanying desire to understand and protect fair use for ourselves and for students. It is in this spirit that I turn to the characters' speech within our own story and examine the rhetoric of our conversation—what exactly we are saying about fair use and how we are saying it.

THE STORY WE'VE BEGUN

Our conversation has been taking place for some time now, at least since the founding of the Conference on College Composition and Communication's Intellectual Property Caucus in 1994. Since then, as Lisa Dush (2009) suggested, this conversation might be characterized by three movements or "waves." The scholarship of the first wave tends to focus on how legal policy concerning the World Wide Web reflects the commercial interests of the content industries and, in doing so, often subscribes to antiquated, Romantic notions of solitary authorship that do not support cultural and compositional norms of collaborative practice. The second wave tends to provide a deeper inquiry into "theories of the public domain, fair use, and the rhetorical systems surrounding text ownership" (p. 114). Dush likened the tone of the conversations taking place in

first- and second-wave scholarship to a “wake-up call,” as compositionists tend to issue alarms or warnings of what might happen to both the field and practice of composition if those of us teaching writing do not keep abreast of legal changes, understand how proprietary biases might stifle writers’ freedoms, and protect our own and our students’ right to fair use. Dush suggested that within the current third wave of scholarship, compositionists have just begun moving beyond the wake-up call and turning toward the subject of pedagogy. It is this pedagogical turn in our conversation—“the question of *how* we talk with students about copyright and IP issues” (p. 115, Dush’s emphasis)—that deserves further address.

The turn Dush described has come about for a number of reasons, all of which have to do with the changing nature of student texts and the contexts of their distribution; to some degree, the turn is a result of practical necessity. Today, students often compose new media texts by appropriating sounds, images, and hypertext from the work of others, and they often distribute these texts in both academic and public spheres. Students in my classes, for instance, have brought their new media compositions into the classroom for purposes of evaluation and also posted them on Web sites or blogs for purposes of public communication. As a discipline, we have not been entirely correct in assuming that we and students may appropriate material fairly within academic environments; we have, however, worked rather successfully under this assumption. Also, we have been able to remain largely immune to the problem of infringement when we confine the circulation of texts to the classroom. In this case, texts simply do not reach a wider audience and do not participate in external economic markets: In short, because virtually no one sees them, virtually no one is aware of whether they might infringe on copyright. However, when texts traverse academic and public arenas, they radically complicate the question of fair use; this is especially true for non-print genres that rely on appropriated images or audio clips. For instance, while I might be able to appropriate eight words from Raymond Carver’s short story within the context of this print essay, I might not be able to appropriate the same number of words within the context of a song or a multimedia text published on the Internet.

In fact, the economic value of sampled language within the entertainment industry has made it seemingly difficult to appropriate even a small number of words without facing threats of litigation. In the landmark case *Grand Upright v. Warner* (1991), Gilbert O’Sullivan sued rapper Biz Markie for appropriating three words (“alone again naturally”) and a small portion of music from one of his songs. Although Markie’s song “Alone Again” repeats only these three words—all of the other lyrics are original—and samples only a portion of O’Sullivan’s melody, this instance was found to be one of copyright infringement.

ment. Without recognizing any sense of irony, the judge who heard the case, Kevin Thomas Duffy, began his opinion by appropriating four words from Exodus 20:15—“Thou shalt not steal”—and proceeded to claim that Biz Markie was not using material fairly; Markie was, in fact, guilty of theft. Although I do not have the time or space here to address what exactly makes Biz Markie’s use of appropriated language “theft” and Judge Duffy’s appropriated language “quotation,” I find it important to note, for the moment, the complications and confusions in determining fair use and the particular legacy of this case. Since the ruling, which led to the development of the clearance industry within the music business, the process of sampling language—whether melodic or verbal—has become increasingly expensive. According to attorney Alan Korn (2007), major record companies now seek a flat fee of \$100–5000 per sample or \$.01–.07 in royalties per sale. Lucky for me, I am not singing the title of this chapter.

Although not as expensive as music samples, appropriations from visual images can carry a significant price tag and, when not officially permitted, can lead to accusations of infringement. Martine Courant Rife (2009) cited four recent trials concerned with the use of copyrighted visual images: *Mattel Inc. v. Walking Mountain Productions aka Tom Forsythe* (2003); *Kelly v. Arriba Soft Corp.* (2003); *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.* (2003); and *Bill Graham Archives v. Dorling Kindersley* (2006). The subjects of these cases range from the display of Barbie dolls in fine art photography to the reproduction of Grateful Dead posters in a coffee table book. The outcomes of the trials vary. Regardless, all of them point to the unique problem of visual images within copyright law. While the music business has its clearance industry, the fields of art, art history, and publishing have permissions clauses and *chases*. For instance, while art publishers rarely require authors to obtain permission to quote from other writers in their texts (except in the case of whole works or very lengthy quotations), they have defaulted to the practice requiring authors to obtain permissions for reproducing artworks they comment upon. Seeking and paying for rights to visual reproduction have become enormous problems. The College Art Association’s Committee on Intellectual Property (2004) has described these processes as overly “complex, painstaking, and financially onerous” (p. 4), and publishers have actually begun suggesting that art historians avoid using images altogether because they have become “impossibly expensive” (Bielstein, 2006, p. 101). Relying on an animated icon from popular culture, Jonathan Lethem described the general problem of attempting to use visual images instead of words this way:

the truth is I could write a whole book ... describing [Homer Simpson’s] yellow skin and protuberant eyes, and no one

would ever be able to block my choice as an artist there, or make it too expensive for me to do it. But if a visual artist or a filmmaker or a digital montage maker tried to capture that image, which is just part of a visual language that is floating around, they wouldn't have my freedom. (Benfer, 2007)

By citing these examples, I don't mean to suggest that students are in a position equivalent to that of established musicians and artists within the publishing and entertainment industries (although some of them, in fact, are), but I do mean to suggest that when their work enters a public forum, it is subject to the same laws and perceptions of law, which largely favor the content industries. Given this complication, let me return to Dush's question: How are we talking with students about copyright and IP issues? More specifically, what are we saying about fair use to 21st-century writers who have already moved beyond the confines of traditional print technology to appropriate images, sounds, or electronic text in Web writing and new media projects?

WHAT OUR TEXTBOOKS TELL US

Although textbooks and handbooks may not offer the most accurate reflections of how individual teachers discuss fair use in their classrooms, they remain the most widely available pedagogical materials for study and, as such, offer insight to our discipline's larger conversation with students. To an extent, they reveal our field's assumptions about what students do and do not need to know about fair use in an era of new media.

One of the most common assumptions found in our pedagogical materials—one that I think most of us subscribe to and support—is that students' experience of writing instruction should be relevant to their public lives; moreover, the texts they produce should be designed for use inside and outside of the classroom. In *Seeing and Writing 3*, a visual rhetoric textbook that offers some opportunity for new media production, Donald McQuade and Christine McQuade (2006) articulated one of their goals as cultivating "skills identified with both verbal and visual literacy" that will "enable [students] to learn, recognize, understand, and create compelling and convincing messages for audiences within and beyond the halls of higher education" (p. 4). This is a fine goal. Of course, if this is our goal, and if students are already producing texts that circulate in academic and public spheres, then their work is subject to the problems associated with copyright law that I have described above. It is somewhat surprising, then, that McQuade and McQuade's textbook, which concerns the

appropriation and integration of visual images, does not mention issues of infringement or fair use, and perhaps even more surprising that this absence is not particular to their textbook. Rather, it is indicative of our conversation as a whole: If we talk about fair use at all, we don't talk much.

Citing Sources

Our pedagogical materials reveal three approaches to discussing the subject with students, the first two of which address fair use only tacitly. In the first approach, textbook authors do not mention fair use or permissions explicitly, but rely on the incorrect assumption that source materials—mainly visual images—are being used fairly if they are cited according to prevailing academic conventions. For instance, in *Writing in a Visual Age*, Lee Odell and Susan Katz (2006) tell students that “all visuals copied from another source should be cited, either in the caption or in the text, according to the documentation style you are using” (p. 623). Although Odell and Katz position students to write brochures and newsletters for public consumption, they do not introduce the subject of permissions or reveal to students that the conditions for determining fair use are independent of documentation: That is, in public contexts, new media writers might cite a source with utmost accuracy but might still infringe on copyright if they have not acquired permissions, depending upon the purpose, nature, amount, and effect of their appropriative compositions. Biz Markie cited his source; he was found guilty of infringement.

A number of visual rhetoric textbooks rely on the misconception that students need only be concerned with accurate documentation of visual images, including *Design, Compose, Advocate* (Wysocki & Lynch, 2007) and *Beyond Words* (Ruszkiewicz, Anderson, & Friend, 2006). In the latter text, Ruszkiewicz et al. exaggerate writers' liberties. When offering students advice for beginning a visual collage of images downloaded from the Web, they state that “you can find images for your collage just about anywhere ... Use Google or another online search engine ... and remember to save citation information” (2006, p. 145). They do not suggest to students that they may need not only to cite their sources but also to acquire permissions for the images they download. Although the authors' underlying assumption might be that the use of appropriated images for this project is so radically transformative (within the context of a collage) that it clearly qualifies as fair use, this logic remains tacit, and the entire subject of fair use and permissions goes unmentioned. Further, while assuming that citing appropriated images is enough, the authors misdirect students by suggesting they use images from “just about anywhere”—a step toward potential copyright infringement—rather than leading them toward freely available

resources like Creative Commons, where they might find images that are designated as clearly appropriable under specified conditions. While encouraging students to engage in public, multimedia composition, these textbook authors revert to the discipline's default-treatment of student writing as if it were isolated to the classroom; they misapply academic standards to public writing. I suspect this is the case because they are mired in the ideology of our field: They don't readily consider the prospect that student writing—which, historically within composition and rhetoric, has served mostly as disposable evidence for evaluation—might have consequences in the public sphere.

Silencing Potential Conversations

If the first approach to our conversation with students errs on the side of attributing writers too much freedom, the second errs on allowing too little. Rather than present the question of fair use as contextual and subject to debate, textbook authors subscribing to this second approach inform students that seeking permissions for appropriated material is mandatory. This assumption can be found in a number of our pedagogical materials, including *Picturing Texts* (Faigley, George, Palchik, & Selfe, 2004), *Everything's an Argument* (Lunsford & Ruskiewicz, 2004), *The McGraw-Hill Guide* (Roen, Glau, & Maid, 2009), and *Designing Documents and Understanding Visuals* (Munger, 2008). In this last text—a handbook for students engaged in visual production—Roger Munger (2008) presents the problem of appropriation this way: “If you include copyrighted visuals in a document you intend to publish (in print or on the Web), you must credit your source and obtain written permission from the copyright holder” (p. v-31). The language of this imperative is echoed elsewhere: “if you are going to disseminate your work beyond your classroom—especially by publishing it online—you must ask permission for any material you borrow from an Internet source” (Lunsford & Ruskiewicz, p. 408); “if your writing will be made available to an audience beyond your classroom ... you will need to ask permission to use any visual from a source that you include” (Roen et al., p. 822); “if you use someone else's images, including those you find on the Web, you need to obtain permission from the owner” (Faigley et al., p. 455). Although this rhetoric acknowledges the very real problem of permissions in the public sphere, it oversimplifies the complexity of this problem by reverting to the language of mandates; here, students “must” and “need to” seek permissions, even though—according to the law—this may not be the case. The very concept of fair use is designed to provide writers and artists the liberty *not to* seek permissions in cases where they are, for example, working toward the cultural and intellectual advancement of society, using

material for educational or journalistic purposes, or asserting their protected right to free speech. Practically speaking, Heartfield, Duchamp, Picasso, Warhol, Rauschenberg, and many more modern artists would not have been able to produce art if they had always sought to obtain permissions. More recently, pictures of Abu Ghraib would not have been seen by the American public if reporters had heeded the mandates for permission seeking listed above.

The problem I see in this approach to discussing the appropriation of copyrighted materials is that its permission-seeking imperative obfuscates or even erases the concept of fair use, which disappears from the conversation before a productive dialogue can even get started. When permission seeking is treated as mandatory, the authority for determining whether appropriated materials may be used is placed entirely outside of the borrowing writer's purview; the writer is thus stripped of her agency and ability to participate in a complex process of decision-making. Instead, the permission granter is free to say "no" to a request for reproduction, and the permission seeker is beholden to this decision. Recognizing this problem, fair use advocates have begun waging a campaign against unnecessary permission chases. In her scholarship on the issue, Rife (2009) suggested to teachers and students quite plainly that "we should not ask permissions every time" we seek to use copyrighted material (p. 148). When discussing the reproduction of visual images in his recent book, *Peers, Pirates, and Persuasion*, John Logie (2006) stated that: "while I have done my best to identify and acknowledge the copyright holders for these images, I have determined not to seek permissions for these obviously fair uses" (p. 149). The logic of this determination works to deny ultimate power to holders of derivative rights, to recover a sense of agency and authority for the writer who relies on appropriate practices, and to counter abuses of copyright law that scholar-activists like Logie feel are too proprietary in nature. In short, Logie has made the decision to assert his right to fair use to protect this very right from disappearing; the motive underlying Rife's advice fulfills a similar purpose. Of course, both Logie and Rife make their assertions from positions of expertise: they are obviously familiar with the four factors used to determine fair use according to U.S. Code and they have been exposed to four-factor analyses (the decision-making process that the law relies upon to distinguish fair use from infringement). It is this very step—exposure to definitions of fair use and four-factor analysis—that has been left out of the textbooks surveyed above and the majority of those produced with our discipline.

Engaging Fair Use

The third approach to discussing fair use is the rarest; it is also the most important, for it exposes students to the four factors of fair use and attributes

to them the agency to decide whether permission-seeking is necessary. This approach takes two forms. The first, as exemplified by *Designing Writing* (Palmquist, 2005), does not reproduce the four factors but asks students to consider “copyright and fair use regarding the use of digital illustrations, such as photographs and other images, audio clips, video clips, and animations” (p. 28) and refers them to the law itself by way of a URL that contains the actual text of the fair use provision as articulated in Title 17. In the second form, textbook authors reproduce and discuss the four factors by way of questions students may ask themselves about the use of copyrighted materials. Somewhat paradoxically—and I have no good explanation for this—the handbook that includes the most robust discussion of fair use is one designed largely for print culture and contains only limited discussions of new media composition. In *A Writer’s Resource*, Elaine Maimon, Janice Peritz, and Kathleen Yancey (2008) offer students exposure to four-factor analysis during one of their brief discussions of new media and Internet technology. I reproduce their advice in full:

The popularity of the World Wide Web has led to increased concerns about the fair use of copyrighted material. Before you post your paper on the Web or produce a multimedia presentation that includes audio, video, and graphic elements copied from a Web site, make sure that you have used copyrighted material fairly. The following four criteria are used to determine if copyrighted material has been used fairly:

- **What is the purpose of the use?** Educational, nonprofit, and personal use are more likely to be considered fair than is commercial use.
- **What is the nature of the work being used?** In most cases, imaginative and unpublished materials can be used only if you have the permission of the copyright holder.
- **How much of the copyrighted work is being used?** If a writer uses a small portion of a text for academic purposes, this use is more likely to be considered fair than if he or she uses a whole work for commercial purposes.
- **What effect would the use have on the market for the original?** The use of a work is usually considered unfair if it would hurt sales of the original. (p. 269)

The language here echoes the fair use provision in Section 107 of Title 17, and mimics the kind of analysis practiced regularly by professional artists, li-

barians, writers, and legal experts alike. It approximates the sort of analytical questioning judges engage in when making decisions on copyright cases.

Here, as well as in *Designing Writing*, textbook authors move away from the language of imperative. Maimon and colleagues (2008) do not suggest that students “must seek permissions” but that they should “make sure” they have “used copyrighted materials fairly,” and Palmquist (2005) states that students “*might* need to request permission” (p. 28, my emphasis). While the difference between “must” and “might” may seem negligible, it represents a dramatic change in constructions of student identities and understandings of copyright law. The more nuanced language of ambiguity invites students to participate in larger processes of analysis and negotiation, to which they should be exposed if they are being treated professionally as writers in a new media culture and as citizens in a democracy. Rather than hide the complications of determining fair use in a strangely paternal fashion, it exposes them to these complications and, in doing so, positions them to be agents responsible both for their decisions as critical thinkers and for the consequences of these decisions within public culture.

WHAT MIGHT WE SAY? A CASE IN POINT

The introduction of four-factor analysis within the pedagogical materials of our field is, of course, only a preliminary stage in engendering a larger conversation about writing and fair use. In the remainder of this chapter, I build upon the discussion of fair use initiated by Palmquist (2005) and by Maimon et al. (2008). More specifically, I draw from one case study to suggest how and why we might further pursue this conversation in our classrooms so that we better prepare students to conduct fair use analysis within the contexts of their own textual production and its online dissemination.

In 2003, thousands of internal emails from Diebold, the largest manufacturer of electronic voting machines, were leaked and spread across the Internet. Because these emails revealed serious flaws in the reliability of Diebold’s voting machines—which had been used in national elections—and exposed their vulnerability to hacking, Diebold sought to immediately contain their dissemination. The company did so by invoking copyright law, specifically a provision from the Digital Millennium Copyright Act. They sent a flurry of cease and desist letters not simply to Internet users who were displaying this material on their Web sites but to Internet Service Providers (ISPs) who were hosting these Web sites. In one instance, when Diebold discovered that Nelson Pavlosky and Luke Smith, Internet users and students at Swarthmore College,

were displaying contents from the email archive on their Web site, they sent cease and desist letters to three parties associated with the allegedly infringing Web site: Swarthmore College, the students' ISP; Online Policy Group, the ISP for an IndyMedia Web site that contained a hyperlink to Pavlosky and Smith's site; and Hurricane Electric, Online Policy Group's upstream provider. In their letter to Swarthmore, attorneys for Diebold stated the following:

The website you are hosting infringes Diebold's copyrights because Diebold Property was placed on this website without Diebold's consent. The purpose of this letter is to advise you of our clients' rights and to seek your agreement to the following: (1) to remove and destroy the Diebold Property contained at the web site identified in the attached chart and (2) to destroy any backup copies of the Diebold Property in your possession or under your control. (Cohn & Seltzer, 2004, p. 6)

Faced with the threat of litigation, most individuals and ISPs who received cease and desist letters from Diebold removed the allegedly infringing material and/or hyperlinks to this material immediately. Swarthmore College was no exception. The institution succumbed to pressure from Diebold and stopped hosting Pavlosky and Smith's site even though it was related to an academic study of electronic voting authored in preparation for an academic conference, "Choosing Clarity: A Symposium on Voting Transparency."

Although their site was removed by Swarthmore, Pavlosky and Smith refused to accept Diebold's claim of infringement, for they considered the use of the appropriated material journalistic, fair, and protected under their constitutional rights. In the words of Pavlosky, Diebold's tactic of invoking copyright law effectively to censor access to materials of public interest represented "a perfect example of how copyright law can be and is abused by corporations" to prevent freedom of speech (Schwartz, 2003, p. 1). The students joined forces with Online Policy Group, which had refuted Diebold's cease and desist letter through claims of fair use and, further, had refused to stop hosting IndyMedia's Web site or remove its hyperlink to the email archive in question. Together, Pavlosky, Smith, and Online Policy group sued Diebold, asserting the company's accusation of infringement "was based on knowing material misrepresentation," an actionable claim under a provision of the DMCA (17 U.S.C. 512(f)) and, furthermore, "interfered with [the] contractual relations" between the students and their Internet service providers (*Online*, 2004, p. 2). As is now widely known, they were successful in court; the judge hearing the

case found that Online Policy Group, Pavlosky, and Smith had all used material fairly and that Diebold had, indeed, abused the tenets of copyright law for its own self-interest, essentially as a public relations effort to remove material damaging to its reputation.

Luckily, when faced with a censorial copyright claim, Pavlosky and Smith did not acquiesce to Diebold's or Swarthmore's decisions or heed the advice of composition textbooks that suggest writers *must* have permission to use copyrighted material; if they had not asserted their agency to publish their appropriated material, the Diebold scandal may have been effectively covered up through the misuse of copyright law as a censoring mechanism. The problems of electronic voting and questionable election results may not have been exposed to public scrutiny, and the California legislation that banned the use of Diebold's faulty voting machines may not have been developed. In short, these students' ability to conscientiously resist seeking permissions mattered; it had economic, political, cultural, and legal consequences in the public sphere. Of course, in this story, the students were not the ideal, docile subjects constructed by most composition textbooks.

The story of their case, *Online Policy Group v. Diebold, Inc.*, is important here for two reasons. First, it suggests the need to develop our conversations with students in ways that better acknowledge how contested appropriations of new media can be in the public sphere, what sort of censorial pressures contemporary writers can face, and what sort of issues are at stake when rights to fair use are determined or asserted. In this example, two writers reproduced appropriated material and created a hyperlink to this material, which led to a significant contestation of authorial agency, control, and power. Further, this contestation was characterized by the sort of hegemonic and counter hegemonic positioning that, according to Rosemary Coombe (1998), "is operative when threats of legal action are made as well as when they are acted upon" (p. 9). In light of this reality, it becomes clear that willful ignorance of fair use or simple acquiescence to copyright holders' demands—the trends of our textbooks—are not sufficient for students, and our conversation needs to move well beyond these norms. Second, the case reveals how we might develop conversations with students by examining the very process of fair use analysis.

In his decision in favor of the Online Policy Group, Pavlosky, and Smith, Judge Fogel claimed that "Diebold knowingly materially misrepresented that Plaintiffs infringed Diebold's copyright interest, at least with respect to the portions of the email archive clearly subject to the fair use exception" (*Online*, 2004, p. 7). Pivotal to the overall decision on material misrepresentation was the right to fair use, which Fogel concluded was applicable to the students' appropriative composing practices. In his determination of whether their use

of material was indeed fair, Fogel quoted Section 107 of Title 17 (the fair use provision) in its entirety and engaged in the sort of four-factor analysis that Maimon et al. (2008) approximated (on a much smaller scale) in *A Writer's Resource*. In his summary judgment, he analyzed each of the four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

When discussing the first of the four factors, legal experts often address the key questions of whether appropriations of copyrighted material are used for commercial, nonprofit, or educational purposes, and whether the function of the use is transformative (i.e., beyond mere reproduction). In his discussion of this factor, Judge Fogel concluded that the primary purpose of the use in question was to inform the public through a form of journalistic criticism. In this sense, the use was both noncommercial and transformative. None of the parties involved sought to profit from the publication of the email archive (it was not being sold) and the archive itself was transformed within its new publication context. Fogel stated, "Plaintiff's and IndyMedia's use was transformative: they used the email archive to support criticism that is in the public interest, not to develop electronic voting technology" (*Online*, 2004, p. 6). In other words, the content of the emails was no longer being used to communicate problems with voting machines (for the purpose of improving the machines and making them a more saleable product); rather, it had been "reframed," as the plaintiff's attorneys had suggested, "as part of a political discussion about the mechanics of democratic elections" (Cohn & Seltzer, 2004, p. 10). For these reasons—and emphatically because the appropriated material was used "in the public interest," a phrase Fogel deployed several times in his judgment—factor 1 was found to weigh in favor of fair use.

Decisions on factor 2 tend to hinge on questions of whether copyrighted material is creative or factual in nature and whether it is published or unpublished at the time of appropriation. When analyzing the second factor, Judge Fogel argued that because the material under question was, indeed, factual and not creative, the plaintiff's use of it was not infringing. In his summary judgment, he claimed, "copyright law protects only creative works, not facts" (*Online*, 2004, p. 3). Although it is arguable whether emails might be considered "creative" (akin to "imaginative" genres like fiction or poetry), it appears that in this instance, the emails under examination—which consisted of "questions and answers from Diebold support staff, feature reports, bug reports, update notes" (Cohn and Seltzer, 2004, p. 11)—were used to communicate factual information within a business setting, and, further, were not defined by the kind of marketable potential that "imaginative" literature possesses. Although

fair use determinations tend to favor published over unpublished works, Fogel asserted that the unpublished status of Diebold's archive was "not dispositive." In this particular case, he claimed, "the fact that the email archive was unpublished does not obviate application of the fair use doctrine," largely because Diebold never intended to publish (and thereby seek profit from) the archive. (*Online*, p. 6). For these reasons, Fogel determined that analysis of factor 2 supported fair use.

The third factor is concerned with how large a portion of a copyrighted work is used and how crucial or central the appropriated portion is to the original work. Under Fogel's analysis, the third factor revealed particular complications. The plaintiffs appropriated or linked to an entire archive of Diebold employee email; however, as the plaintiff's attorneys argued in their request for summary judgment, this archive represented only a small fraction of Diebold's total email correspondence. Furthermore, according to Pavlosky and Smith, they were required to post the whole archive for reasons of journalistic integrity after Diebold accused them in news reports of "taking individual emails out of context" (*Online*, 2004, p. 6). Recognizing these issues, Fogel turned to the question of whether crucial information was reproduced. Diebold's attorneys had argued that the emails contained proprietary information "as well as Diebold trade secret information, and even employees' personal information" (Mittelstaedt, 2004, p. 9). While Justice Fogel suggested that the reproduction of emails that contain proprietary code might be infringing—as contended by attorneys for Diebold—he noted the defendants' failure to "identify which of the more than thirteen thousand emails support its argument," that is, to prove that certain emails did, in fact, contain "trade secrets" or strictly private, proprietary information (*Online*, p. 6). Given this failure, Judge Fogel suggested that factor 3 tended to weigh in favor of fair use.

When discussing the fourth factor, Fogel contended that Pavlosky and Smith's use of Diebold's copyrighted materials had no effect on the market for or value of these materials. According to Fogel, the defendants could not prove that the appropriated email archive had any particular marketability or economic value in the first place:

Diebold has identified no specific commercial purpose or interest affected by the publication of the email archive ... Publishing or hyperlinking to the email archive did not prevent Diebold from making a profit from the content of the archive because there is no evidence that Diebold itself intended to or could profit from such content. (*Online*, p. 6)

Fogel then moved beyond the issue of the emails' potential profitability to briefly acknowledge the overall economic effect of the archive's publication on the company as a whole. Although he consented that Pavlosky and Smith's use of materials could have a negative economic impact on Diebold—because it raised consumer awareness of serious flaws in their products—he found this to be a moot point. He stated that the use of material might have “reduced Diebold's profits because it helped inform potential customers of problems with the machines” but concluded that “copyright law is not designed to prevent such an outcome” (*Online*, p. 6). In his judgment, then, Fogel drew a clear line between the potential profitability of the appropriated material itself (the emails) and the result of the plaintiff's journalistic critique (negative publicity for Diebold). He clearly asserted that although copyright law might apply to the former, it should not be applied to the latter: That is, the law should not be misused or abused, as it was by Diebold, to suppress the sort of informed critical commentary characteristic of investigative reporting.

TALKING OUTSIDE OF COURT TRANSCRIPTS AND COMPOSITION TEXTBOOKS

I have described Judge Fogel's decision-making process at length here because I believe it represents exactly the sort of analytical practice we should expose students to and also ask them to perform. As Brian Ballentine (2009), Rife (2009), and others have already suggested, we would do students a great service by moving the four-factor analysis out of the courtroom and into the classroom. We should provide opportunities, particularly for those composing for the Internet or in new media, to understand how four-factor analysis might apply to existing texts (by examining cases such as the one described above) and to their own in-process works so that they can be in better command of the work they produce for both academic and public audiences. As Rife (2009) recommended, developing a fair use heuristic or *techné* based on judges' fair use determinations would enable us and our students to create “probable knowledge when determining whether a use ... is likely a fair use” (p. 135). As Ballentine (2009) suggested, examining four-factor analysis within the rulings of foundational cases such as *Sony Corporation of America v. Universal City Studios* and *MGM v. Grokster* might be used for assignments and class discussion or debate so that they become a definitive part of the curriculum.

The purpose of the sort of inclusion Rife (2009) and Ballentine (2009) recommended is not by any means to create a canon of cases or to produce lawyers-in-training, but, as I see it, to fulfill three goals. First, the process of

familiarizing students with four-factor analysis works to protect the right to fair use in an increasingly proprietary culture. The more people who understand their right to fair use, the more people who may assert this right and thereby influence culture and law (as Pavlosky and Smith did in the example above). In short, raising student awareness of the relationship between fair use and freedom of speech has the potential to influence policy on a broad scale. As Rife (2009) suggested, we are currently working within a crucial timeframe, in which “we still have a space to shape law by practice” (p. 150). Second, reviewing four factors in legal cases may help foster an understanding of the ethics of appropriation and the struggles for power involved in this process. By examining cases, students might better understand how writing is situated within the public, legal, and cultural contexts that define the terms of its reception. With student work brought out of isolation, they may be better prepared to negotiate these contexts successfully. Third, and most importantly, familiarity with four-factor analysis might help increase student agency as writers in at least two particular ways.

First, it may influence their capacity for rhetorical decision-making and sharpen their critical thinking skills. Four-factor analysis is, by nature, rhetorical; for instead of relying on any sort of transcendent rules, it utilizes criteria that are radically contingent upon context. As suggested above, each decision about fair use is made on a case-by-case basis, and each factor used to determine this decision is weighed within a specific context of use. In other words, one cannot make the kind of overarching determination that would insist, for example, that works reproducing 60% of copyrighted material are infringing while works reproducing 59% are not. Instead, one would have to analyze the third factor—the amount of material copied—by examining situational phenomena: how text is produced and reproduced within sets of particular circumstances. In *Online Policy Group v. Diebold, Inc.*, the reproduction of an entire email archive was found fair; in *Grand Upright v. Warner* the reproduction of three words and several notes was found infringing. This sort of analysis, then, situates decisions and decision-making as always within the realm of argument; it requires students not to offer ultimately correct answers, but to participate critically and actively in cultural and textual debate while asking questions related to context, genre, and power.

Second, four-factor analysis might increase student agency by making them more cognizant of their rights as writers. As Rife (2007) suggested, students are often uninformed about fair use and misunderstand its relevance to their work. Rife cited the example of a student who unnecessarily “purchased *every* image she used when creating new media class assignments” to insure the avoidance of infringement (p. 156). Teaching four-factor analysis, Rife argued, encour-

ages students to make more informed composing choices and improves their information literacy. Applying the factors to their own work, students may better determine when, why, and how to appropriate and integrate material from sources and whether to seek permissions; they may be better armed to make their own informed decisions about whether to risk accusations of infringement; and they may more thoroughly understand what Rife called the economic, social, and legal “infrastructure” that affects composing practices. Ultimately, Rife insisted that students “need to know what their options are in order to act responsibly and within their own political, social, spiritual, and personal beliefs” and she suggested that teaching the four factors provides them “a high level of knowledge coupled with a high level of agency” (p. 172).

I find the issue of agency—the radical notion of allowing students responsibility for their decisions—perhaps the most compelling reason for talking more substantially about fair use and introducing four-factor analysis. As writing teachers, we are responsible for helping students make informed compositional choices; ultimately we are not in charge of deciding whether they can or cannot appropriate and reproduce images, sounds, or portions of hypertext in work that crosses academic and public boundaries. It is not our job to offer them imperatives about whether they *must* seek permissions when they borrow material or whether they *must* remove allegedly infringing material from their compositions upon receipt of a cease and desist letter. It is high time we move beyond such mandates, and, as Ballentine (2009) suggested, facilitate classroom discussion that is “informative without being prescriptive” (p. 86), that is, discussion that provides students knowledge of concepts and consequences by exposing them to the factors at play. I recommend we talk with students about fair use in a way that enables them, as Rife (2009) suggested, to “insert themselves into larger conversations” about writing, culture, power, and law, and, within these conversations, to develop their own theories about their work. In short, discussing four-factor analysis in its rhetorical complexity is a complicated task, but students should be exposed to—not protected from—this complication.

It may seem difficult to sacrifice precious class time to discussing fair use analysis, but it is imperative to do so. In fact, it is not a sacrifice at all. As the case of the two Swarthmore students demonstrates, in an era in which the technology of writing is changing rapidly and private and public audiences are collapsing, the consequences of understanding the fair use provision affect our basic practices as writers, our right to free expression, and—I am not being hyperbolic here—the very foundations of our democracy. Although conversations about fair use may take up class time, they may also help writers make some of the most significant decisions facing them today, particularly as composers of

new media. Frankly, I cannot think of any subject more worth talking about with contemporary writers—except, perhaps, love.

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